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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Jay M. Ross
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Probate Judges – Supernumerary
Status – Retirement Benefits –
Survivor Benefits – Mobile County

The spouse of an inactive deceased supernumerary probate judge is entitled to receive a percentage of the salary that would be payable to the former judge of probate as that salary is adjusted to reflect any increases or decreases that would be payable to the former probate judge if he or she were currently serving as probate judge.

Dear Mr. Ross:

This opinion of the Attorney General is issued in response to your request on behalf of the Mobile County Commission.

QUESTION

According to Act 1194 (1975), does the spouse of a deceased inactive supernumerary probate judge receive a percentage of the salary paid the judge in his former position as probate judge or a percentage of the salary payable and prescribed by law to the current judge of probate as of the date of the supernumerary judge's death?

FACTS AND ANALYSIS

In your letter of request, you stated the following:

The late John L. Moore, III served as probate judge of Mobile County from July 2, 1963, until his retirement on January 18, 1983. He had elected in 1977 to participate in the Mobile County supernumerary probate judge plan and did so until his retirement. Immediately thereafter, he became a supernumerary probate judge on active-duty status under the provisions of Act 1194 (1975) and continued in that position for more than twenty years.

At his request, Judge Moore became an inactive supernumerary probate judge effective September 1, 2003. He was then paid retirement benefits as provided by Act 1194 and in accordance with the opinion of your office issued to Honorable Lawrence M. Wettermark, Mobile County Attorney, on January 26, 2004, A.G. 2004-062. (These benefits are paid monthly for the life of the judge under section 7(a) of Act 1194.)

Judge Moore died on May 29, 2008. He is survived by his wife. The Mobile County supernumerary probate judge plan provides the following with respect to benefits payable to a surviving spouse:

“After the death of any retired judge or judge of probate of such counties who has held office for a minimum of five years, his spouse shall receive a yearly benefit equivalent to three percent of the salary payable from the county treasury prescribed by law for his former position as judge of probate of such county, for each year of service, not to exceed thirty percent of such salary, payable monthly for the remainder of such spouse's life or until his or her remarriage and shall change in amount as such salary is

hereinafter increased or decreased by
law.”

1975 Ala. Acts No. 1194, 2342, 2345, sect. 7(b).

As noted in your request, section 7(b) of Act 1194 (1975) is open to multiple interpretations. Specifically, with your inquiry you question whether the spouse of an inactive deceased supernumerary probate judge is entitled to receive a percentage of the salary paid the judge in his former position as probate judge or a percentage of the salary payable and prescribed by law to the current judge of probate as of the date of the supernumerary judge's death. If a statute is susceptible to two constructions, one of which is workable and fair and the other unworkable and unjust, the court will assume that the Legislature intended that which is workable and fair. *Ex parte Hayes*, 405 So. 2d 366, 370 (Ala. 1981).

Section 7(b) of Act 1194 specifically provides, in pertinent part, that the surviving spouse “shall receive a yearly benefit equivalent to three percent of the salary payable from the county treasury *prescribed by law for his former position as judge of probate* of such county.” 1975 Ala. Acts No. 1194, 2342, 2345 (emphasis added). This language requires that the spouse's benefit be based on the salary paid to the probate judge in his or her former position as probate judge. Section 7(b) further provides that the amount paid to the spouse shall “*change in amount as such salary is hereinafter increased or decreased by law.*” *Id.* (emphasis added). Both of these provisions must be given effect.

It is the opinion of this Office that the salary that was prescribed by law for the probate judge when he was serving as probate judge must first be determined and that salary should then be adjusted to reflect any increases or decreases that would be payable to that former probate judge if he were still serving in that position today. Thus, the spouse is entitled to receive a percentage of the salary the former probate judge would receive if he were currently serving as the probate judge. This interpretation gives effect to the requirement that the benefit is based on the former probate judge's salary and the requirement that the benefit changes as the prescribed salary is increased or decreased by law. The spouse's benefit is not necessarily based on the salary payable to the current judge of probate, but is based on the salary that would be payable to the former probate judge adjusted to reflect any increases or decreases that would be payable to the former probate judge if he were currently serving as probate judge. See Opinion to Honorable Bobby M. Junkins, Judge of Probate, Etowah County, dated August 31, 2000, A. G. No. 2000-227 (salary of probate judge includes compensation for comparable bench experience).

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To the extent that this opinion is in conflict with the opinion issued to the Honorable Jack Floyd, County Attorney, Etowah County, dated February 17, 1984, A.G. No. 84-00177, that opinion is expressly modified.

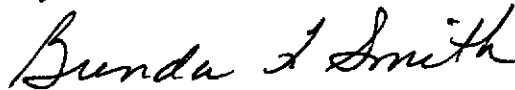
CONCLUSION

The spouse of an inactive deceased supernumerary probate judge is entitled to receive a percentage of the salary that would be payable to the former judge of probate as that salary is adjusted to reflect any increases or decreases that would be payable to the former probate judge if he or she were currently serving as probate judge.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

TROY KING
Attorney General
By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH
Chief, Opinions Division

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